86-349

No.

Supreme Court, U.S.
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In The Supreme Court

OF THE

United States

OCTOBER TERM, 1986

RICHARD P. KUNTZ, et al.,
Plaintiffs-Petitioners,

vs.

NAT J. REESE, et al.,
Defendants-Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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81 pp

QUESTIONS PRESENTED

I.

Is the grant of subject matter jurisdiction under 29 U.S.C. § 1132 exclusive?

II.

Did the court err in finding that plaintiffs, as individuals who involuntarily received purported lump sum distributions from an ERISA pension plan, the amount of which benefits are disputed, lack standing to assert claims for breach of fiduciary duty under ERISA concerning the determination of their benefits under the plan and the failure of defendant plan fiduciaries to supply plan disclosure documents as requested by plaintiffs prior to the distribution of the disputed benefits?

III.

Did the court err in finding that plaintiffs lack standing to assert claims for breach of fiduciary duty under ERISA despite the preemption by ERISA of plaintiffs' state law claims?

IV.

If plaintiffs lack standing under 29 U.S.C. § 1132 and plaintiffs' state law claims are preempted by ERISA, does the court have jurisdiction under 28 U.S.C. § 1331 to entertain plaintiffs' claims under the federal common law of ERISA?

V.

Did the Court of Appeals violate Fed. R. App. P. 40(a) by granting the defendants' petition for rehearing and vacating and

withdrawing its prior decision in plaintiffs' favor and affirming judgment for the defendants without allowing plaintiffs to file a response to the petition for rehearing?

LIST OF ALL PARTIES
TO THE PROCEEDING

PLAINTIFFS-PETITIONERS

RICHARD P. KUNTZ,

DAN CACCAVO,

JIMMY J. HUMES,

GURSEWAK SINGH,

DUANE WHITE,

JOHN W. McCORD

DEFENDANTS-RESPONDENTS

NAT J. REESE,

ANIEL J. EGET,

AMMY NARENS,

DANAT INVESTMENTS,

CAPITOL METALS CO., INC.
a California corporation,

CAPITOL METALS ENTERPRISES,
INC.,

CAPITOL METALS CO., INC.,
NORTHERN CALIFORNIA DIVISION,

GIBRALTAR METALS CORP.,

METAL TRANSPORT, INC.,

CAPITOL METALS CO., INC.,
a Delaware corporation,
formerly named NEWCO-ESTEL,
INC. and sued herein
as ESTELL CORPORATION

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

RICHARD P. KUNTZ, ET AL,

Plaintiffs-Petitioners,

v.

NAT J. REESE, ET AL,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The plaintiffs-petitioners ("plaintiffs") respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered March 31, 1986.

OPINION BELOW

There is no district court opinion in this case. A copy of the Judgment in favor of defendants-respondents ("defendants") is

attached as Appendix A. The first opinion of the United States Court of Appeals for the Ninth Circuit reversing the district court and remanding the case was entered on May 13, 1985 and was reported at 760 F.2d 926 (9th Cir. 1985).

Pursuant to a Petition for Rehearing filed by defendants, the Court of Appeals vacated its previous decision and withdrew its published opinion and entered a second opinion affirming the district court, which opinion is reported at 785 F.2d 1410 (9th Cir. 1986) and is attached as Appendix B.

The Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc, filed by the plaintiffs with respect to the second opinion, were denied on June 4, 1986. A copy of the Order is attached as Appendix C.

JURISDICTION

The second opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 31, 1986. The Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc were denied on June 4, 1986 and this Petition for Certiorari was filed within 90 days thereafter.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331

29 U.S.C. § 1002(7)

29 U.S.C. § 1132(a)

29 U.S.C. § 1132(c)

29 U.S.C. § 1132(e)(i)

29 U.S.C. § 1144(a)

Statutes involved are reproduced as Appendix D.

STATEMENT OF THE CASE

All the plaintiffs were employees of Capitol Metals Co., Inc. and affiliated companies during various periods from 1970 to 1981 and were participants in the Capitol Metal Companies Employees Pension Plan. The corporate defendants include the Capitol Metals corporation and its affiliated enterprises who sponsored the plan. Defendant Danat Investments and the individual defendants are former shareholders of the corporate defendants and are the successors in interest to the corporate defendants who have assumed the liabilities of Capitol Metals Co., Inc. upon its dissolution. The individual defendants were also directors and officers of the corporate defendants and members of the administrative committee of the plan. The corporate defendants and individual defendants were fiduciaries under the

Employee Retirement Income Security Act of 1984 ("ERISA") with respect to the plan.

The essence of plaintiffs' claim is that they did not receive the amount of benefits under the plan to which they were entitled based upon the representations of the defendants and that the defendants failed to comply, in violation of 29 U.S.C. § 1132(c), with ERISA requirements for providing plaintiffs with pension plan disclosure documents which had been requested by plaintiffs during the course of their employment. In their original complaint filed in the district court, basing jurisdiction upon 29 U.S.C. § 1132(e), the plaintiffs alleged that the defendants misrepresented to each plaintiff, both at the time he interviewed for his job and afterwards during the course of his employment, that the plaintiffs would be immediately eligible to participate in the pension plan. The original complaint

further alleged that the defendants described the plan as "standard" and "good" and that, in response to plaintiffs' requests for the plan disclosure documents required to be supplied by defendants, the defendants promised to send the disclosure documents in the near future and advised the plaintiffs not to worry about their benefits under the plan. It is alleged in the original complaint that the plan was neither standard nor good, but instead the plan discriminated inordinately in favor of highly compensated employees and failed to provide any coverage at all to other employees. The original complaint further alleged that the defendants falsely represented to plaintiffs that when defendant Estell Corporation purchased Capitol Metals Co., Inc. that the plaintiffs would be covered by a new, retroactive pension plan.

The defendants moved to dismiss the complaint for lack of subject matter jurisdiction. The district court dismissed the second through seventh claims for relief in the original complaint apparently on the grounds that these claims were state law causes of action over which the court could decline to exercise its pendent jurisdiction. The defendants then moved to dismiss for failure to state a claim under ERISA, to strike parts of the complaint and to require plaintiffs to make a more definite statement of the case. The district court granted this motion in part, striking the plaintiffs' prayer for punitive damages and their allegations of misrepresentation. The plaintiffs filed a first amended complaint stating only federal claims under ERISA. The defendants again moved to dismiss the amended complaint for failure to state a claim, arguing that a California statute of limitations applied to

plaintiffs' ERISA claims and that such statute barred the claims, and to strike as irrelevant plaintiffs' allegations of fraud and misrepresentation concerning plan benefits by the defendants. The district court granted the motions in their entirety without leave to amend.

The plaintiffs appealed the decision of the district court to the Ninth Circuit Court of Appeals. After briefing by the parties of the substantive issues, the defendants moved the Court of Appeals to dismiss for lack of subject matter jurisdiction on the basis that the plaintiffs did not have standing. The Court of Appeals issued its original opinion deciding in favor of plaintiffs and reversing and remanding to the district court. The court's original decision held that the plaintiffs did have standing to sue under ERISA and concluded that Congress did not intend the term "participant" as used in

the standing provision of ERISA to be interpreted so narrowly that former employees are denied standing under ERISA to challenge the correctness of the amount of vested benefits that have been distributed to them. The court in its original opinion also held that ERISA preempted the state law claims asserted by plaintiffs but that the allegations of the amended complaint stated a federal claim for relief under ERISA. The court also held that ERISA provides a federal cause of action to consider allegations that a pension plan fiduciary has misrepresented the fact and/or quality of plan coverage.

The court's original opinion further held that the ERISA statute of limitations under 29 U.S.C. § 1113 applied to plaintiffs' claims for breach of fiduciary duty and failure to disclose plan documents and that plaintiffs' ERISA claims were not time barred under the allegations

of the complaint. Finally, the court held that the district court had erred in striking the plaintiffs' prayer for punitive damages under ERISA.

The defendants filed a petition for rehearing seeking reconsideration of the court's holding on the issues of standing and application of the ERISA statute of limitations to plaintiffs' claims. Without allowing plaintiffs to file an answer to the petition for rehearing, the court granted the petition for rehearing, vacated its previous decision in favor of plaintiffs, withdrew its prior opinion and confirmed the judgment of the district court dismissing plaintiffs' amended complaint.

Plaintiffs have brought this petition for a writ of certiorari for review of the decision of the court below that plaintiffs lack standing to maintain this action under ERISA and dismissing the amended complaint. Under well established law, at this stage of

the proceedings, the allegations of the complaint must be taken as being true and must be construed in the light most favorable to the plaintiffs. Mathers Fund, Inc. v. Colwell Co., 564 F.2d 780, 783 (7th Cir. 1977)

REASONS FOR GRANTING THE WRIT

I.

IS THE GRANT OF SUBJECT MATTER JURISDICTION UNDER 29 U.S.C. § 1132 EXCLUSIVE?

In its second opinion, the court below ruled that plaintiffs lacked standing to sue under ERISA because they did not meet the definition of "participant" under 29 U.S.C. § 1002(7) and therefore were not included in the list of parties entitled to sue under ERISA enumerated in § 1132. (See further discussion in Section II below).

Implicit in the court's holding is the assumption that § 1132 is an exclusive grant of subject matter jurisdiction under ERISA. Section 1132(e)(1) provides that district

courts shall have exclusive jurisdiction of civil actions under ERISA brought by the Secretary of Labor or by a participant, beneficiary or fiduciary. A substantial and material conflict exists among the Courts of Appeal as to whether the grant of jurisdiction in § 1132 is exclusive and this Court should accept certiorari in the present case in order to resolve this conflict.

In Fentron Industries, Inc. v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982), the Ninth Circuit held the jurisdictional grant of § 1132 is not exclusive and that an employer, which is not a party listed in § 1132, could sue a pension fund under ERISA for failure to pay benefits and thereby impairing the employer's relationship with the union. The court found that the employer's alleged injuries fell within the zone of interests that Congress intended to protect when it

enacted ERISA. As stated by the Ninth Circuit:

> "Finally, we do not believe that Congress, in enacting ERISA, intended to prohibit employers from suing to enforce its provisions. The omission of employers from 29 U.S.C. § 1132 is not significant in this regard. There is nothing in the legislative history to suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers.... In view of the intent of Congress to protect employer-employee relations, we hold that the statute does not prohibit employers from suing to enforce its provisions." Id. at 1305 (citations and footnotes omitted, emphasis added).

The Ninth Circuit recently followed the Fentron case in Award Service, Inc. v. Northern California Retail Clerks Unions & Food Employers Joint Pension Trust Fund, 763 F.2d 1066 (9th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 850, 88 L.Ed.2d 890 (1986), where the court held that, despite the specific provisions of § 1132, an employer had standing to bring an action under ERISA to enforce its terms where the

employer alleges specific and personal injury. Id. at 1068-69. In Award Service, the employer was seeking to recover the overpayment of contributions to an ERISA pension plan.

The decisions of the Ninth Circuit in Fentron and Award Services conflict with decisions of other Courts of Appeals. In Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2nd Cir.), cert. denied, 464 U.S. 845, 104 S.Ct. 148, 78 L.Ed.2d 138 (1983) the Second Circuit rejected the Fentron analysis in holding § 1132 was an exclusive jurisdictional grant and a fund or plan can not maintain an action under ERISA.

Similarly the Fentron and Award Service decisions of the Ninth Circuit conflict with the decision of the Sixth Circuit in Whitworth Bros. Storage Company v. Central States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir. 1986) in

which the court reviews the decisions in Fentron and Award Service but declines to follow them in holding that:

> "...Congress intended to limit the parties who could maintain actions pursuant to § 502 [29 U.S.C. § 1132], that § 502 is an exclusive grant of jurisdiction, and that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions." Id. at 228.

Accord, Tuvia Convalescent Center v. National Union, 717 F.2d 726 (2d Cir. 1983) (follows Pressroom, rejecting Fentron); Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia, 549 F.Supp. 307 (E.D. Pa. 1982) aff'd. 720 F.2d 661 (3d Cir. 1983).

Plaintiffs submit that the grant of subject matter jurisdiction under § 1132 is not exclusive and they have standing to maintain this action under ERISA. The issue of whether § 1132 is an exclusive grant of subject matter jurisdiction under ERISA is

an issue of great importance and a conflict exists between the circuits which should be resolved by this Court.

II.

DID THE COURT ERR IN FINDING THAT PLAINTIFFS, AS INDIVIDUALS WHO INVOLUNTARILY RECEIVED PURPORTED LUMP SUM DISTRIBUTIONS FROM AN ERISA PENSION PLAN, THE AMOUNT OF WHICH BENEFITS ARE DISPUTED, LACK STANDING TO ASSERT CLAIMS FOR BREACH OF FIDUCIARY DUTY UNDER ERISA CONCERNING THE DETERMINATION OF THEIR BENEFITS UNDER THE PLAN AND THE FAILURE OF DEFENDANT PLAN FIDUCIARIES TO SUPPLY PLAN DISCLOSURE DOCUMENTS AS REQUESTED BY PLAINTIFFS PRIOR TO THE DISTRIBUTION OF THE DISPUTED BENEFITS?

29 U.S.C. §1132(a)(2) authorizes a "participant, beneficiary or fiduciary" to bring a civil action for breach of fiduciary duty under ERISA. 29 U.S.C. §1132(a)(1)(A) authorizes a "participant or beneficiary" to bring a civil action against an ERISA plan administrator to recover statutory damages for failure to disclose plan documents as required by ERISA. 29 U.S.C. §1002(7) defines a participant as "any employee ...

who is or who may become eligible to receive a benefit of any type from an employee benefit plan."

The court below in its second opinion held that plaintiffs are not "participants" under §1002(7) "...because, as former employees whose vested benefits under the plan have already been distributed in a lump sum, the Kuntz plaintiffs were not 'eligible to receive a benefit', and were not likely to become eligible to receive a benefit..." Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir. 1986).

It is absolutely essential to the effective enforcement of the participant rights, fiduciary duty and plan document disclosure provisions of ERISA that former plan members who have involuntarily received lump sum distributions of the purported amount of their plan benefits, such as plaintiffs in the present case, retain their status as "participants" and have standing

to maintain an action under ERISA at least with respect to the determination of the correct amount of their benefits and with respect to violations of ERISA fiduciary duties occurring prior to the purported lump sum distribution. If such former plan members are considered to no longer be "participants" for jurisdictional purposes, then the possibility of abuse by pension plan fiduciaries under ERISA without any means of remedy by plan participants is greatly increased. An employer sponsoring a pension plan or other plan fiduciaries could commit breaches of fiduciary duty with respect to either plan assets or the rights of participants, terminate the plan or the employment of the participants and immediately pay out the purported amounts of the benefits due to the participants and then be forever immune from any redress in federal court of their breaches of fiduciary

duty. Clearly such a result was not intended by Congress when it enacted ERISA.

The present case provides a vivid example of such a possibility which runs totally contrary to the broad remedial policies underlying ERISA. Plaintiffs allege in their complaint that defendants committed breaches of fiduciary duty with respect to plaintiffs by making misrepresentations to plaintiffs concerning the provisions of the pension plan and the amount of plaintiffs' benefits thereunder and by failing to deliver plan disclosure documents as required by ERISA. The defendants, in their status as plan fiduciaries, secretly terminated the pension plan and then distributed to plaintiffs the purported amounts of their vested accrued benefits. If plaintiffs do not retain their status as "participants" because of the distribution of their purported benefits and therefore lack standing to maintain this

action, the result will be that defendants, as soon as they completed the distribution of purported but disputed benefits to plaintiffs, were beyond redress by plaintiffs in federal court (and also in state court, see Section III below) for the flagrant breaches of fiduciary duty committed by defendants toward plaintiffs.

Such a possible holding and result was considered and emphatically rejected in Hager v. Veco Corp., 1 Employee Benefits Cases (BNA) 1827 (N.D. Ill. 1979). In Hager, the plaintiff had been employed by the defendant corporation and was a participant in an ERISA plan. The plaintiff was discharged from his duties and received distributions from the plan. As in the present case, the plaintiff and defendant in Hager disagreed as to whether the plaintiff had received a full distribution of his benefits under the plans.

The court in Hager analyzed the defendant's argument, that the plaintiff was not a "participant" as he had received distribution of his interests in the plan, as follows:

> "Defendant's construction of ERISA attempts to defeat plaintiff's rights ... The consequence of defendant's interpretation would be that an employer who administered its own qualified pension or profit-sharing plan, would possess unchecked power to make final distribution of a participant's interest without being held accountable to the recipient of that distribution. An employee, whose employment had been terminated, would cease to be a plan 'participant' and lose all rights protected by ERISA. The employer, as plan administrator, would be totally insulated from inquiry concerning an ex-employee's rights under the plan.
>
> Congress could not have intended such an inequitable and absurd result. The incongruity of defendant's position with Congress' intent in passing ERISA is evidenced in the legislative history...
>
> Plaintiff's construction of ERISA's disclosure requirement, on the other hand, provides an effective safeguard against fiduciaries misuse of plan funds ...

> Otherwise, an employee whose employment had been terminated and who had received a distribution allegedly equal to his full interest, would be placed in an impossible position." Id. at 1829 (emphasis added)

The interpretation of ERISA in Hager is consistent with the other Court of Appeals cases which have denied standing to plaintiffs on the ground that they do not meet the statutory definition of "participant" because none of the other cases concern terminated participants alleging breaches that occurred while they were still participants. Most of these cases generally concern employees who never participated in a plan. A plaintiff has no standing under ERISA where he waived his right to participate in the plan, Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1983), or fails to make a credible showing that he ever satisfied minimum vesting requirements. Weiss v. Sheet Metal

Workers Local No. 544 Pension Trust, 719 F.2d 302 (9th Cir. 1983). A plaintiff cannot sue as beneficiary of a participant's interest where the participant failed to qualify as a recipient of pension benefits because he died before benefits matured. Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust, 662 F.2d 617 (9th Cir. 1981); See also, Nugent v. Jesuit High School, 625 F.2d 1285 (5th Cir. 1980) (former employee never vested in plan benefits), and Saladino v. ILGWU National Retirement Fund, 754 F.2d 473 (2d Cir. 1985) (former employee failed to meet minimum service requirement for vesting).

The remaining cases denying standing concern former participants who attempt to sue plan fiduciaries for actions taken after complete distribution of the participants' benefits. In Joseph v. New Orleans Electrical Pension and Retirement Plan, 754 F.2d 628 (5th Cir.) cert. denied ___ U.S.___

106 S.Ct. 526, 88 L.Ed.2d 458 (1985), plaintiffs accepted lump sum distributions of benefits provided by the plan as it read at the time of their retirement, and they therefore could not sue with respect to amendments to the plan increasing benefits made after their retirement. See also, Yancey v. American Petrofina, Inc., 768 F.2d 707 (5th Cir. 1985) (no standing to challenge change in plan effective after plaintiff's retirement where he received full amount due under plan as in effect when he retired) and Saladino, 754 F.2d at 474, (employee who retired in 1966 cannot sue plan administrator for failure to supply plan documents requested in 1981 where there was no showing that he was a participant at the time of such failure).

Plaintiffs, in the present case, in contrast, have alleged in their complaint that they received their benefit distributions involuntarily due to a secret

plan termination and they immediately disputed the amount of the benefit payments.

If an individual must meet the ERISA definition of "participant" in order to have standing under §1132, it is unclear at what time he or she must meet such definition. Standing itself is determined at the time a suit is filed but a plaintiff's status as "participant" may be determined at the time of filing suit or, more justly, at the time of the alleged breach.

§ 1132 should be construed to provide standing to an individual who qualified as a "participant" at the time of an alleged breach because such interpretation is necessary to prevent obvious injustice. Any ambiguity in a statute should be resolved in favor of a just or fair interpretation thereof. Carey v. Donahue, 240 U.S. 430, 36 S.Ct. 386, 60 L.Ed. 726 (1915). Moreover, the general intention of the legislature is held to control the strict letter of the

statute where an adherence to the strict letter would lead to injustice. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). The general remedial intent of ERISA must control over any restrictive interpretation denying all remedy to terminated participants for pre-termination breaches.

Interpreting ERISA to allow suit by individuals who were participants at the time of alleged breaches would arrive at a more fair and just result for both employees and employers. Participants injured by a breach by a plan fiduciary would not be forced to chose between receipt of benefits and filing suit, and employers could not avoid liability simply by terminating the plan and distributing benefits. At the same time, employers could currently administer their plans without fear of suit by past participants.

Whether plaintiffs have standing to assert claims for breach of fiduciary duty under ERISA is an important question of federal law which has not been, but should be, settled by this Court.

III.

DID THE COURT ERR IN FINDING THAT PLAINTIFFS LACK STANDING TO ASSERT CLAIMS FOR BREACH OF FIDUCIARY DUTY UNDER ERISA DESPITE THE PRE-EMPTION BY ERISA OF PLAINTIFFS' STATE LAW CLAIMS?

Plaintiffs have effectively been denied all remedy for the flagrant breaches of fiduciary duty alleged to have been committed by defendants. The court interprets ERISA to deny plaintiffs standing to sue in federal court, with the court apparently believing that plaintiffs have state law remedies available. The opinion concludes "noting that the dismissal is without prejudice to state law claims the plaintiffs might pursue." Kuntz, 785 F.2d at 1412. However, plaintiffs' state law

claims are entirely preempted by ERISA, leaving them no remedy at all. Such a result violates the remedial purpose of ERISA and is contrary to the intent of Congress in enacting the statute.

Plaintiffs' state law claims are for breach of fiduciary and contractual duties stemming from misrepresentations by the fiduciaries of an ERISA pension plan. ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a). This Court has recognized that Congress intended the federal courts to construe ERISA's preemption clause broadly and that a law "relates to" an employee benefit plan if it "has a connection with, or reference to, such a plan." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98-99, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983). Plaintiffs' claims for breach of fiduciary and contractual duties "relate to" an

ERISA-covered plan because the subject of the misrepresentations underlying their claims were their rights under such a plan.

In its original opinion, the court below concluded that plaintiffs' state law claims were preempted. Kuntz v. Reese, 760 F.2d 926, 933-935 (1985). Although the opinion has been vacated because of the question of standing, the court's reasoning with respect to preemption is not affected. See, e.g., Russell v. Massachusetts Mutual Life Insurance Co., 722 F.2d 482 (9th Cir.), reversed on other grounds, ___ U.S.___, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) (ERISA preempts state law claims for tortious infliction of emotional distress); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968, 1084, 102 S.Ct. 512, 641, 70 L.Ed.2d 384, 619 (1981) (state common law action for tortious interference with contract preempted); Ziskind v. Retail Clerks

International Association, 3 E.B.C. 1012, 1014-15, (E.D. Cal. 1982) (state law causes of action for breach of contract and negligent misrepresentation, such as those alleged in the present case, preempted by ERISA); Provience v. Valley Clerks Trust Fund, 163 Cal.App.3rd 249, 209 Cal.Rptr. 276 (1984) (claims for fraud in connection with employee benefit plans are preempted by ERISA, leaving California courts with no jurisdiction).

Whether ERISA should be interpreted to deny plaintiffs standing to sue in federal court when ERISA's preemption rule denies them access to state court is an important question of federal law which has not been, but should be, settled by this Court.

IV.

IF PLAINTIFFS LACK STANDING UNDER 29 U.S.C. § 1132 AND PLAINTIFFS' STATE LAW CLAIMS ARE PREEMPTED BY ERISA, DOES THE COURT HAVE JURISDICTION UNDER 28 U.S.C. § 1331(a) TO ENTERTAIN PLAINTIFFS' CLAIMS UNDER THE FEDERAL COMMON LAW OF ERISA?

If the grant of jurisdiction under § 1132 is exclusive (see Section I above) and plaintiffs fail to meet the definition of "participants" under § 1002(7) and lack standing under § 1132 (see Section II above) and plaintiffs' state law claims for misrepresentation and breach of contract are preempted by ERISA (see Section III above), plaintiffs submit that their claims for misrepresentation and breach of contract concerning their rights under the pension plan maintained by defendants arise under the federal common law of ERISA and the court has subject matter jurisdiction under 28 U.S.C. § 1331, the jurisdictional provision for questions arising under federal law.

Federal courts recognize that the statutory scheme of ERISA does not cover all possible questions that can arise under ERISA and it is necessary for federal courts to develop an extensive common law under ERISA, in part because of the extremely broad scope of preemption of state law. The legislative history of ERISA supports the development of a federal common law under ERISA. Congress recognized that § 1144(a) bars application of formerly relevant state law to cases relating to ERISA plans and Congress instructed federal courts to formulate federal common law to fill the gaps in the ERISA statutory structure.

> In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans -- unless a criminal statute of general application -- establishing State termination insurance programs, et cetera, will be superseded. It is also intended that a body of Federal substantive law will be developed

> by the courts to deal with issues involving rights and obligations under private welfare and pension plans.
>
> 120 Cong. Rec. S15751 (daily ed. August 22, 1974) (remarks of Sen. Javits) (emphasis added).

The broad scope of preemption under ERISA was recognized by this Court in Shaw, 463 U.S. 85. Further, in Massachusetts Mutual Life Insurance Co. v. Russell, ___ U.S. ____, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), Justice Brennan in his concurring opinion recognized the direction of Congress to federal courts to develop federal common law under ERISA. "The legislative history demonstrates that Congress intended federal courts to develop federal common law" in fashioning relief under ERISA. Id. at 3097 (Brennan, J., concurring)

The preemption of state law by ERISA and the Congressional directive to develop a federal common law under ERISA require the application of federal law to actions premised on obligations created by ERISA.

Plaintiffs contend that their claims for misrepresentations by the defendants concerning the scope and quality of the coverage of the pension plan are governed by federal common law and the court has jurisdiction of this case under 28 U.S.C. § 1331.

As indicated in Section III above, the court below held in its original opinion that plaintiffs' state law causes of action for misrepresentation were preempted by ERISA. Due to this preemption, plaintiffs' claims for misrepresentation arise under the federal common law of ERISA. In examining the preemption issue under the Labor Management Relations Act of 1947, this Court has held that "[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." Franchise Tax Board v. Laborers' Vacation

Trust, 463 U.S. 1, 24, 103 S.Ct. 2841, 2854 (1983).

In Whitworth Bros., 794 F.2d 221, the Sixth Circuit examined the question of subject matter jurisdiction under ERISA where an employer sued to recover payments alleged to have been mistakenly made to an ERISA plan. The Court first held that the employer lacked standing to bring the action under § 1132. 794 F.2d at 228. The court further held that the employer did not have an implied cause of action under the terms of ERISA. Id. at 233. However, the court concluded that because ERISA's preemption provision and legislative history mandated application of federal law to the employer's claims for breach of contract, these claims arose under federal law pursuant to 28 U.S.C. § 1331 and the district court was in error in holding that it did not have subject matter jurisdiction. Id. at 233. As stated by the court:

> "It is clear that Whitworth's claim, governed by federal common law, arises under federal law for the purposes of 28 U.S.C. § 1331. In Illinois v. City of Milwaukee, 406 U.S. 91, S.Ct. 1385, 31 L.Ed.2d 712 (1972), the Court squarely held that '§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.' Id. at 100, 92 S.Ct. at 1391. Thus, since Whitworth's action for restitution is governed by federal common law, it 'arises under' federal law for purposes of § 1331. Accordingly, the district court erred in concluding that it had no jurisdiction over the case." Id. at 236 (citations omitted).

cf., Award Service, 763 F.2d at 1068; Freeman, 721 F.2d at 656-57; Pressroom, 700 F.2d at 892, n.7; Crown Cork, 549 F.Supp at 310.

The question of whether federal courts have subject matter jurisdiction under 28 U.S.C. § 1331 for claims arising under the federal common law of ERISA presents an important question of federal law which has not been, but should be, settled by this Court.

V.

DID THE COURT OF APPEALS VIOLATE FED. R. APP. P. 40(a) BY GRANTING THE DEFENDANTS' PETITION FOR A REHEARING AND VACATING AND WITHDRAWING ITS PRIOR DECISION IN PLAINTIFFS' FAVOR AND AFFIRMING JUDGMENT FOR THE DEFENDANTS WITHOUT ALLOWING PLAINTIFFS TO FILE A RESPONSE TO THE PETITION FOR REHEARING?

Federal Rule of Appellate Procedure 40(a) provides, in part, as follows: "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

In the original opinion of the court below, it was stated: "This case presents four important questions regarding the scope and application of [ERISA]." Kuntz, 760 F.2d at 928. The court originally ruled in favor of plaintiffs on all four issues, including the question of standing to sue under ERISA stating "Because both the case law and ERISA's legislative history

undermine these arguments, we reject defendants' novel interpretation of § 1002(7)." Id. at 930.

The court also described the other issues in the case as being issues of first impression in the Ninth Circuit and in ruling in favor of plaintiffs on the issue of the applicability of the ERISA statute of limitations under 29 U.S.C. § 1113 to plaintiffs' claims, the court recognized "the importance of this question of law" and stated that no court had previously ruled on the question of whether the ERISA statute of limitations applies to an ERISA fiduciary's violation of his duty to disclose plan documents. Id. at 936.

Despite the court's clear recognition in its original opinion of the importance and novelty of the ERISA issues presented, despite the fact that the court had defendants' Petition for Rehearing under submission for ten months and despite the

requirement of Fed.R.App.P 40(a) that a petition for rehearing not ordinarily be granted in the absence of a request by the court for an answer to the petition for rehearing, the court below never allowed plaintiffs to file an answer to the petition for rehearing prior to its reversal of its own original decision.

Plaintiffs were directly prejudiced and harmed by this failure to allow them to file an answer to the petition for rehearing. In its original opinion, the court showed a correct understanding of the allegations of plaintiffs' complaint. The court concluded its consideration of the standing issue in its first opinion by stating that "...Congress did not intend the term 'participant' to be interpreted so narrowly that former employees are denied standing under ERISA to challenge the correctness of the amount of vested benefits that have been distributed to them." Kuntz, 760 F.2d at

933 (emphasis added). At this point, the court clearly recognized that the essential thrust of the allegations of plaintiffs' complaint was to dispute the correctness of the benefits under the plan that they had received in the purported lump sum distributions.

However, the defendants' petition for rehearing inaccurately characterized the allegations of the complaint in several crucial aspects. Plaintiffs' amended complaint specifically pleaded that the plaintiffs were participants in the plan for the entire period of their employment. Defendants' petition for rehearing, in contrast, inaccurately characterized the complaint by stating that the plaintiffs did not allege that they were eligible for benefits from the plan but only alleged misrepresentations and failure to deliver plan documents.

Further, both plaintiffs' initial and amended complaint specifically pleaded that the defendants had in bad faith terminated the pension plan and made the purported but disputed lump sum distributions to plaintiffs. Again, the defendants' petition for rehearing mischaracterized the allegations of plaintiffs' amended complaint by stating:

> "What remedy should be provided if an employer terminates a plan in bad faith for the purpose of denying benefits need not be addressed in this case because that did not happen in this case and because there is no allegation that it did." (Defendants' Petition for Rehearing, p. 10)

Because of the failure of the court , in violation of Fed.R.App.P 40(a), to allow plaintiffs to file a response to defendants' petition for rehearing prior to its being granted, defendants' mischaracterizations of plaintiffs' complaints went unanswered and uncorrected. A reading of the second opinion below indicates that these

inaccurate but unanswered characterizations were crucial to the court's reversal of its prior decision. The court stated:

> "Because, if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits, they are not plan participants. The Kuntz plaintiffs do not allege that their vested benefits were improperly computed, rather they allege breach of fiduciary duty or of a duty to disclose information about benefits, thus any recoverable damages would not be benefits from the plan.
>
> Having decided a damage claim is not a plan benefit, we must also point out that the plaintiffs are not eligible for any other type of benefit either. The Kuntz plaintiffs are all former employees who have already received their vested benefits." Kuntz, 785 F.2d at 1411. (emphasis added).

The court further reasoned that former employees without a colorable claim to vested benefits do not come within the definition of participant under § 1002(7), citing Saladino and Joseph. This aspect of the court's second opinion overlooks several Court of Appeals cases that indicate the

remedy for misrepresentations by plan fiduciaries and for failure to provide adequate plan disclosure documents, such as have been alleged by plaintiffs, may well be in the form of benefits under the plan. McKnight v. Southern Life and Health Insurance Co., 758 F.2d 1566 (11th Cir. 1985) (Plan administrator's description of benefits in disclosure documents which was inconsistent with plan provisions changed substantive benefit provided under the plan in order to avoid unfairness to employee who reasonably relied on the representations in the disclosure documents.); Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984) (Procedural violations may rise to the level that they alter the substantive relationship between employer and employee.)

If an ERISA fiduciary's violation of plan disclosure requirements can change the benefits available under the terms of the plan, as indicated by McKnight, then an

action such as the present one by plaintiffs, alleging numerous and significant disclosure violations by the defendants may be considered an action seeking further plan benefits and the plaintiffs would qualify as former employees seeking further benefits under the plan so that standing exists under § 1002(7) and § 1132.

Again, the failure of the court below to allow plaintiffs to file a response to the defendants' petition for rehearing precluded plaintiffs from being able to bring these authorities to the attention of the court in a timely manner prior to the issuance of its second opinion.

The court's failure to allow a response to the defendants' petition for rehearing is directly contradictory to the rationale behind the prohibition under Fed.R.App.P 40(a) that an answer to a petition for rehearing will not be received unless

requested by the court. The Notes of the Advisory Committee on Appellate Rules state as follows: "It [the prohibition against filing a reply to a petition for rehearing] is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it." For the reasons stated above, it is submitted that the present case is one of those "very rare instances" in which a reply to a petition for rehearing would have been of great assistance to the court.

The only case known to counsel for plaintiffs construing the provision of Fed.R.App.P. Rule 40(a) that a petition for rehearing will not ordinarily be granted in the absence of a response to the petition is United States v. Allegheny-Ludlum Industries, Inc., 568 F.2d 1073 (5th Cir. 1978), in which the court granted the appellant's petition for rehearing without

allowing the filing of an answer and withdrew a portion of its prior opinion relating to the standard to be applied in awarding attorneys' fees to prevailing defendants in civil rights cases. However, in Allegheny-Ludlum, the Court of Appeals specifically withheld action on the petition for rehearing awaiting a decision of the U.S. Supreme Court which it described as "squarely and unequivocally" determining the issue raised by the petition for a rehearing. The court said that it saw no necessity to request a response to the petition for a rehearing before acting in obedience to a controlling Supreme Court decision, stating "a case which the Supreme Court specifically and unanimously notes as having adopted the wrong rule...is not an ordinary one."

It is submitted by plaintiff that, unlike Allegheny-Ludlum, the requirement of Fed.R.App.P. 40(a), that a petition will not

ordinarily be granted in the absence of a request for a response for a reply to the petition, was violated in the present case and that the allowance of the filing by plaintiffs of a response to the petition would have been of assistance to the court and was necessary to protect the rights gained by plaintiffs under their victory in the original opinion by the court below.

The action of the Court below in granting the defendants' petition for rehearing, vacating its prior decision in favor of plaintiffs, withdrawing its prior opinion and affirming judgment for defendants without allowing the plaintiffs to file a response to the defendants' petition for rehearing has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Dated: August 28, 1986.

Respectfully submitted,

R. Bradford Huss

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HALL, HENRY, OLIVER
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KUNTZ2
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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD P. KUNTZ, et al., Plaintiffs, vs. NAT J. REESE, et al., Defendants.	)	NO. C. 82 1138 SW

(Entered June 7, 1983)

JUDGMENT

IT IS HEREBY ORDERED that judgment shall be entered in the above-captioned matter for defendants.

DATED: June 6, 1983

/s/ Spencer Williams
UNITED STATES DISTRICT
JUDGE

APPENDIX "B"

Richard P. KUNTZ, et al.,
Plaintiffs-Appellants,

v.

Nat J. REESE, et al.,
Defendants-Appellees.

No. 83-2151

United States Court of Appeals,
Ninth Circuit.

March 31, 1986.

Former employees who [sic] pension benefits had been distributed, brought action against plan administrator for breach of fiduciary duty. The United States District Court for the Northern District of California, Spencer Williams, J., dismissed action, and employees appealed. The Court of Appeals, 760 F.2d 926, reversed and remanded. On petition for rehearing, the Court of Appeals held that: (1) former employees were not plan participants entitled to bring claim against

administrator, and (2) damage claim was not "plan benefit" within meaning of Employee Retirement Income Security Act.

Former opinion vacated and withdrawn, district court affirmed.

Real, District Judge, sitting by designation, filed concurring opinion.

1. Pensions

Former employees, whose vested benefits under pension plan had already been distributed in lump sum, were not "eligible to receive benefit," and were not likely to become eligible to receive benefit, at time they filed suit against plan administrators, and thus were not "plan participants" entitled to bring suit under Employee Retirement Income Security Act [29 U.S.C.A. §§ 1002(7), 1132(a)(1)(A), (a)(2)] against plan administrator for breach of fiduciary duty and failure to disclose pertinent plan documents. Employee Retirement Income

Security Act of 1974, §§ 3(7), 502(a)(1)(A), (a)(2), as amended, 29 U.S.C.A. §§ 1002(7), 1132(a)(1)(A), (a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Pensions

Damage claim is not "plan benefit" within meaning of provision of Employee Retirement Income Security Act [29 U.S.C.A. § 1002(7)], which defines plan participant as employee or former employee eligible to receive benefit of any type from employee benefit plan. Employee Retirement Income Security Act of 1974, § 3(7), as amended, 29 U.S.C.A. § 1002(7).

See publication Words and Phrases for other judicial constructions and definitions.

R. Bradford Huss, Hall, Henry, Oliver & McReavy, San Francisco, Cal., for plaintiffs-appellants.

Donn Dimichele, Brian C. Cuff, Ball, Hunt, Hart, Brown & Baerwitz, Los Angeles, Cal., Richard B. Glickman, Rosenman, Colin, Freund, Lewis & Cohen, San Francisco, Cal., for defendants-appellees.

On Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc.

Before TANG and PREGERSON, Circuit Judges, and REAL*/ District Judge.

PER CURIAM:

Shortly after we decided this case on May 13, 1985, see Kuntz v. Reese, 760 F.2d 926 (9th Cir. 1985), the Reese defendants1/ petitioned our court to rehear this matter. The Reese defendants argue, among other things, that several persuasive authorities outside this circuit undermine the contention that the Kuntz plaintiffs2/ had

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*/ Hon. Manuel L. Real, Chief Judge, United State District Court for the Central District of California, sitting by designation.

1/ The Reese defendants include Nat Reese, who is the pension plan administrator, Daniel Eget, Sammy Narens, Danat Investments, and five other companies.

2/ The Kuntz plaintiffs include Richard Kuntz, Dan Caccavo, Jimmy Humes, John McCord, Gursewak Singh, and Duane White.

standing under the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1381 (1982), to sue for breach of fiduciary duty and nondisclosure of pension plan documents.

After carefully considering these authorities, we have now concluded that the Kuntz plaintiffs lack standing. We therefore grant the petition for rehearing, withdraw our previously-filed opinion, and affirm the district court's judgment, which dismissed the action below.

Interpreting this Court's decision in Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1983), we held originally that ERISA §§ 502(a)(1)(A) & 502(a)(2), 29 U.S.C. §§ 1132(a)(1)(A) & 1132(a)(2), authorized the Kuntz plaintiffs to bring suit: that those provisions permit a "participant or beneficiary" to bring a

civil action against the plan administrator to recover statutory damages for breach of fiduciary duty and for failure to disclose pertinent plan documents. We reasoned that the Kuntz plaintiffs were "participant[s]" within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), which defines a participant as

> any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan.

In essence, we thought that plaintiffs with a claim for damages against the plan administrator were "participants" because the damage claim could be viewed as a "benefit of any type."

[1, 2] We are now persuaded that the Kuntz plaintiffs are not participants because, as former employees whose vested benefits under the plan have already been

distributed in a lump sum, the Kuntz plaintiffs were not "eligible to receive a benefit," and were not likely to become eligible to receive a benefit, at the time that they filed the suit. Because, if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits, they are not plan participants. The Kuntz plaintiffs do not allege that their vested benefits were improperly computed, rather they allege breach of fiduciary duty or of a duty to disclose information about benefits, thus any recoverable damages would not be benefits from the plan.

Having decided a damage claim is not a plan benefit, we must also point out that the plaintiffs are not eligible for any other type of benefit either. The Kuntz plaintiffs are all former employees who have already received their vested benefits.

There are no allegations of plans to return to work or to start accruing benefits once again under the pension plan. Indeed, the plan is now defunct. Former employees who have neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits simply do not fit within the "may become eligible" language of § 1002(7). Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473, 476 (2d Cir. 1985). In fact,

> [t]o be a "participant" a person must have either a present or a future right to benefits under the pension or retirement plan. This excludes retirees who have accepted the payment of everything due them in a lump sum, because these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments. Such retirees have no present or future right to Plan funds and the Plan no longer has any obligation to these individuals.

Joseph v. New Orleans Electrical Pension & Retirement Plan, 754 F.2d 628, 630 (5th

Cir.), cert. denied, ____ U.S. _____, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985).

While we are still convinced that the purpose and policy of ERISA is to remedy hardships caused by inequitable treatment of workers by plan administrators, see H.R. Rep. No. 533, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4647, we are now persuaded that the agency charged with administering ERISA would not consider the Kuntz plaintiffs to be plan participants entitled to this solicitude. The Department of Labor has promulgated certain regulations pertaining to the administration of ERISA. These regulations specifically exclude from the definition of "participant" any person "to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." 29 C.F.R. § 2610.2 (1985); see Joseph, 754

F.2d at 630 (quoting Department of Labor regulation).

This regulation, of course, pertains to situations in which a pension plan purchases annuities for former plan beneficiaries and participants. Nonetheless, it is a persuasive interpretation of the statute. And because we must give substantial deference to an agency's interpretation of a statute within its administration, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984), we find the Department of Labor's interpretation persuasive.

Although the Kuntz plaintiffs initially persuaded us that they should have standing to litigate this matter, we are now convinced that their argument, if followed, would have the effect of converting claims of all types, whether colorable or not, into

"potential benefits" within the meaning of ERISA. Because we do not believe that Congress intended this result, and because our reconsidered interpretation is consistent with previous authorities from our own court[3/] we now VACATE our previous decision, WITHDRAW our published opinion, and AFFIRM the district court's judgment, noting that the dismissal is without prejudice to state law claims the plaintiffs might pursue.

3/ See, e.g., Scott v. Gulf Oil Corp., 754 F.2d 1499, 1505-06 (9th Cir. 1985); Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654, 655-56 (9th Cir. 1983); Weiss v. Sheet Metal Workers No. 544 Pension Trust, 719 F.2d 302, 303-04 (9th Cir. 1983) (per curiam), cert. denied, 466 U.S. 972, 104 S.Ct. 2347, 82 L.Ed.2d 864 (1984); Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust, 662 F.2d 617, 621 (9th Cir. 1981).

REAL, District Judge, concurring:

I concur in the result now reached by the majority but adhere to the reasoning in my dissent, Kuntz v. Reese, 760 F.2d 926, 939 (9th Cir. 1985).

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD P. KUNTZ, et al., Plaintiffs-Appellants, vs. NAT J. REESE, et al., Defendants-Appellees.	)	No. 83-2151 O R D E R

June 4, 1986.

Before: TANG and PREGERSON, Circuit Judges, and REAL,*/ District Judge

The panel as constituted above has voted to deny the petition for rehearing. Judges Tang and Pregerson voted to reject the suggestion for rehearing en banc and Judge Real recommended such rejection.

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*/ Hon. Manuel L. Real, Chief Judge, United States District Court for the Central District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX "D"

28 U.S.C. § 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

29 U.S.C. § 1002. Definitions

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

§ 1132. Civil enforcement

(a) Persons empowered to bring civil action

A civil action may be brought --

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to

enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(c). Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may

in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(e). Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this

subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

KUNTZ (appendix/special)

(2)

Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD P. KUNTZ, et al.,

Petitioners,

vs.

NAT J. REESE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES, AS REQUIRED BY RULE 34, AND OF AFFILIATED COMPANIES AS REQUIRED BY RULE 28.1

Plaintiffs-Petitioners:

Richard P. Kuntz,
Dan Caccavo,
Jimmy J. Humes,
Gursewak Singh,
Duane White,
John W. McCord,

Defendants-Respondents:

Nat J. Reese,
Daniel J. Eget,
Sammy Narens,
Danat Investments,
Capitol Metals Co., Inc.
a California corporation,
Capitol Metals Enterprises, Inc.,
Capitol Metals Co., Inc.,
Northern California Division,
Gibraltar Metals Corp.,
Metal Transport, Inc.,
Capitol Metals Co., Inc.,
a Delaware corporation,
formerly named Newco-Estel,
Inc. and sued herein as
Estell Corporation,

The affiliated companies are parties to the lawsuit.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

RICHARD P. KUNTZ, ET AL,

Plaintiffs-Petitioners,

v.

NAT J. REESE, ET AL,

Defendants-Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

The defendants respond as follows to the Plaintiffs' Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Statement of the Case appearing in the petition is in general accurate. The first sentence of the Statement of the Case indicates,

however, that during their employment by defendants, all plaintiffs were participants in the pension plan at issue. This is contrary to the facts and to the allegations of the complaints. Both the original and the first amended complaints alleged some of the plaintiffs never became participants in the pension plan. Complaint at 4, lines 12-14; First Amended Complaint at 6, lines 12-13 and 23-25, and at 7, lines 6-7.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals correctly determined the plaintiffs have no standing to sue under ERISA because they are not "participants" as

defined in 29 U.S.C. § 1002(7). The plaintiffs are not participants because they have already received, by lump sum distribution, all benefits to which they are entitled under the pension plan at issue. The plaintiffs' claims that the defendants misrepresented the quality of the pension plan do not confer standing on the plaintiffs.

Because plaintiffs are not participants, they are not entitled to invoke federal jurisdiction under ERISA. The weight of authority holds that the jurisdictional grant of § 1132 is exclusive, and that result best comports with this Court's stated

reluctance to give expansive construction to a statute as comprehensive and carefully crafted as ERISA. Nor can plaintiffs sue under the federal common law of ERISA, because the Court has held that actions by parties in the position of plaintiffs do not "arise under" ERISA for jurisdictional purposes.

The Ninth Circuit's failure to request an answer to defendants' petition for rehearing did not violate Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 does not require that an answer be requested. Moreover, plaintiffs were not prejudiced by the Ninth Circuit's failure

to request an answer because: (1) the court was very familiar with the plaintiffs' arguments, having adopted those arguments in its first opinion, and thus presumably had the arguments in mind when it ruled on defendants' petition for rehearing, and (2) the plaintiffs' arguments were made, considered again, and rejected when the plaintiffs petitioned for a rehearing after the Ninth Circuit issued its second opinion.

1. THE COURT OF APPEALS CORRECTLY DETERMINED THE PLAINTIFFS LACKED STANDING TO SUE UNDER ERISA.

The plaintiffs have a right to sue under ERISA only if they are "participants." 29 U.S.C. § 1132. A "participant" is defined in 29 U.S.C. § 1002(7) as:

> any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . . (Emphasis added.)

The plaintiffs in this case are former employees of Capitol Metals Co., Inc., which was sold to the Estell defendants. The Reese defendants were formerly the shareholders of Capitol Metals Co. The pension plan which formerly covered the

plaintiffs was terminated and the assets distributed to those who were participants in the plan, including plaintiffs. Thus, the employer no longer exists, the pension plan no longer exists, and the plaintiffs are no longer employed by their former employer.

The Court of Appeals for the Ninth Circuit therefore held that because the plaintiffs' benefits were distributed to them before they brought suit, plaintiffs do not qualify as participants as defined in § 1002(7). Kuntz v. Reese, 785 F.2d 1410, 1411-12 (9th Cir. 1986). The plaintiffs will never "become eligible to receive a benefit" from the pension plan, the Ninth Circuit reasoned.

The Ninth Circuit's decision is consistent with the interpretation given the word "participant" by the Department of Labor, the agency charged with administering ERISA. In its regulations the Department of Labor has determined:

> (ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if --
>
> . . . .
>
> (B) The individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

29 C.F.R. § 2510.3-3(d)(2)(ii)(B) (1985). In another regulation, the Department of Labor excluded from the definition of "participant" any person

"to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." 29 C.F.R. § 2610.2 (1985).

Although this Court is the ultimate authority in determining the intent of Congress in enacting ERISA, the Department of Labor's interpretation of the word "participant" is persuasive and is entitled to substantial deference. Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 2782-83, 81 L.Ed. 2d 694 (1984). That interpretation makes it clear that the plaintiffs in this case are not participants and therefore have no standing to bring this action.

The Ninth Circuit's decision in this case is also consistent with the decisions of the other circuit courts that have confronted the issue. In Joseph v. New Orleans Electrical Pension and Retirement Plan, 754 F.2d 628 (5th Cir. 1985), cert. denied, 106 S.Ct. 526, the plaintiffs sued the trustees of a pension plan for breach of their duties under ERISA. All plaintiffs had retired before 1981 and had elected to receive a lump sum distribution of their retirement benefits rather than a continuing monthly benefit. In July 1981 the trustees voted an eightfold increase in the monthly benefits, thus creating a marked disparity between those who accepted a lump sum distribution on retirement and those who accepted a

continuing monthly benefit. Moreover, the trustees permitted lump sum retirees who had retired after January 1, 1981 to take advantage of the benefit increase but not lump sum retirees who had retired before January 1, 1981.

The Court of Appeals for the Fifth Circuit held the plaintiffs had no standing to bring the lawsuit because they were not "participants" as defined in 29 U.S.C. § 1002(7). Because the plaintiffs had already been paid the benefits owing to them under the pension plan, they were not persons who "may become eligible to receive a benefit," reasoned the court:

> To be a "participant," a person must have either a present or a future right to benefits under the pension or retirement plan. This excludes retirees who have accepted the payment of everything due them in a lump sum, because

> these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments. Such retirees have no present or future right to Plan funds, and the Plan no longer has any obligations to these individuals. This is consistent with prior Fifth Circuit decisions limiting the "may-become-eligible" phrase to current employees, and to former employees with currently vested benefits, as well as with Department of Labor regulations pertaining to the administration of ERISA. Those regulations specifically exclude from the definition of "participant" "an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." The interpretation of a statute by the agency charged with its administration is entitled to substantial deference.

754 F.2d at 630 (footnotes omitted.)

Accord, Jackson v. Sears Roebuck & Co., 648 F.2d 225, 228-29 (5th Cir. 1981); Nugent v. Jesuit High School of

New Orleans, 625 F.2d 1285 (5th Cir. 1980).

In Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473 (2d Cir. 1985), the plaintiff, a former member of the union, requested a copy of the union pension plan. The request was refused because plaintiff would not become eligible for benefits because he had ceased union employment at age 53, whereas the plan required that employees work until a later age in order to qualify for a pension. Plaintiff filed a lawsuit to require compliance with ERISA's disclosure requirements and to obtain the $100 per day penalties provided by 29 U.S.C. § 1132(c). The lawsuit was settled and plaintiff thereafter made a motion for attorneys' fees under 29

U.S.C. § 1132(g). That section gives the court discretion to award attorneys' fees in an action brought "by a participant." The district court denied the request for fees on the ground that plaintiff was not a participant. The Court of Appeals for the Second Circuit affirmed, saying:

> We believe that participant is limited to either employees in, or reasonably expected to be in, currently covered employment or former employees with a colorable claim to vested benefits. This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits "may become eligible." A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the term "may become eligible."

Our view, moreover, is the only one consistent with the role accorded by the statutory scheme to those who fall within the term participant. The mandatory requirement that plans send certain documents at specified intervals and annual financial information to participants strongly suggests that this group must be easily identifiable and one with a substantial interest in the matters conveyed. Current employees or those reasonably expected to become such and persons with a colorable claim to vested benefits are in that category. Expansion of the group to former employees of many years past or others with no colorable claim to benefits would create uncertainties as to statutory obligations and impose great costs on pension plans for no legislative purpose. Similarly, the provision that plans inform participants who so request of their accrued and nonforfeitable benefits implies that the persons entitled to such disclosure have a demonstrable claim. We believe, therefore, that Congress intended the term participant to limit the various reporting and disclosure obligations imposed on plans to identifiable persons with a substantial interest in the matters conveyed and not to burden plans with the cost of reporting and

> disclosing to an amorphous, undefined group of individuals who lack any such interest. Any other reading of the statute would reduce the amounts available to actual beneficiaries of plans for no statutory purpose.

754 F.2d at 476.

Not only is the Ninth Circuit's decision in this case consistent with the Department of Labor's regulations and the decisions of other circuit courts that have been called upon to determine the meaning of "participant," the decision is also consistent with other Ninth Circuit decisions that have confronted the issue. See Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1985); Weiss v. Sheet Metal Workers Local 544 Pension Trust, 719 F.2d 302 (9th Cir. 1983),

cert. denied, 466 U.S. 972, 104 S.Ct. 2347, 80 L.Ed. 2d 821 (1984); Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust, 662 F.2d 617 (9th Cir. 1981).

Neither their original complaint nor their first amended complaint alleged the plaintiffs are or may become eligible for benefits from the pension plan. Rather, the complaints allege that defendants made certain misrepresentations about how "good" the plan was and that the plaintiffs are entitled to penalties for defendants' failure to furnish certain plan documents as requested by plaintiffs. These claims are for damages and penalties, not for benefits from a pension plan. If the plaintiffs had standing to pursue the claims, and if

plaintiffs prevailed upon them, the court would not award plaintiffs benefits from a pension plan; the court would instead award damages and impose penalties, neither of which would come from a pension plan which is no longer in existence.

Therefore, plaintiffs' claims in this lawsuit do not make them eligible to receive a benefit from a pension plan. Plaintiffs do not dispute that they received all benefits to which they were entitled under the plan as it existed at the time of termination. They simply claim the benefits actually provided by the plan did not live up to the representations allegedly made by defendants. Such

claims of misrepresentation do not confer standing on the plaintiffs.[1/] In Freeman, supra, the plaintiff, a former employee of the defendant, sued

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[1/] The plaintiffs claim at pages 42 to 44 of their Petition that McKnight v. Southern Life and Health Insurance Co., 758 F.2d 1566 (11th Cir. 1985), suggests the remedy for misrepresentations about a pension plan may take the form of benefits under the plan. Therefore, the argument goes, a suit for damages to redress such alleged misrepresentations may be considered as an action seeking benefits under the plan. Since, under this reasoning, their lawsuit may result in an award of benefits, the plaintiffs claim they "may become eligible" to receive a benefit and are thus participants under ERISA. This argument not only defies common sense and ignores contrary authority, e.g., Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1985), it also incorrectly summarizes the holding of McKnight.

There the plaintiff, a retired employee who was receiving monthly

claiming the employer's misrepresentations had caused the plaintiff to waive participation in the pension plan. The Ninth Circuit held the plaintiff was not a participant because he would not "become eligible to receive a benefit . . . from an employee benefit plan . . . ." The court said:

> At most, this court, or any court for that matter, could award Freeman the damages caused by the alleged fraud. This is different

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benefits from an existing pension plan, sued to recover a larger benefit. The plaintiff claimed his benefit had been computed incorrectly in that he had not been given credit for employment that preceded a break in service. The court did not hold that an award of benefits could be given as a remedy for misrepresentations. Indeed, no claim of misrepresentation was even made. The court simply found the plan at issue had been misinterpreted by the employer and that the plan in fact provided for the benefits the plaintiff claimed.

> from awarding him a "benefit under a plan." If it were not, then any plaintiff who could argue a colorable claim would be a participant, since a victorious law suit would award them a "benefit." We do not feel Congress intended to open the door to this kind of plaintiff when ERISA's jurisdictional provisions were drafted.

721 F.2d at 656.

Apparently conceding they were not participants when they filed their lawsuit, plaintiffs next claim the determination of whether or not they are participants should be made with reference to the time when the alleged wrongs occurred. Petition at 25. That argument was rejected by the Fifth Circuit in Yancy v. American Petrofina, Inc., 768 F.2d 707 (5th Cir. 1985). There the plaintiff was notified that a change would be made

in the manner in which lump sum retirement benefits would be computed. The change would have had the effect of reducing the amount of the lump sum payment. Before the change went into effect, the plaintiff elected to retire early so his benefits would be calculated under the former method of computation. On his early retirement election form the plaintiff wrote the words "under protest."

Thereafter, the plaintiff sued his former employer for breach of fiduciary duty. The Fifth Circuit held the plaintiff lacked standing because he had already received a lump sum distribution and therefore would not become eligible to receive benefits from the plan. 768 F.2d at 708. The court said:

> Yancy contends that he does have standing to bring this suit because he was a participant when the interest change was announced in January 1982. However, questions of standing must be resolved on the facts existing when the challenge is raised. Safir v. Dole, 718 F.2d 475, 481 (D.C. Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 2389, 81 L.Ed. 2d 864 (1984).

768 F.2d at 708. Accord, Brink v. DaLesio, 667 F.2d 420, 427 (4th Cir. 1981); Senter v. General Motors Corp., 532 F.2d 511, 520 (6th Cir. 1976), cert. denied, 429 U.S. 870 (1976); Russell v. New Amsterdam Casualty Co., 325 F.2d 996, 998 (8th Cir. 1964); Janzen v. Goos, 302 F.2d 421, 424 (8th Cir. 1962)(per Blackmun, J.).

Plaintiffs predict various forms of abuse by employers if former employees are not considered parti-

cipants for jurisdictional purposes. They claim employers could commit breaches of fiduciary duty and then either terminate the aggrieved employees or terminate the pension plan in order to immunize the employer from responsibility for the breaches. Petition at 18-19. In such an event the employees would have no remedy, the plaintiffs claim, because the employees cannot sue under ERISA and their state law claims are preempted by ERISA.

The plaintiffs' predictions of dire consequences flowing from the Ninth Circuit's decision in this case are without foundation. First, it is by no means clear that the kinds of claims pursued by the plaintiffs here

are preempted by ERISA. If they are not, victims of abuse will obviously have a remedy even if it is not provided by ERISA. The remedy will simply arise from state rather than federal law. Second, even if the state claims are preempted by ERISA, ERISA provides many protections against and remedies for the abuses feared by plaintiffs.

In Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349, modified 791 F.2d 799 (9th Cir. 1986), the court held that a claim similar to that made here was not preempted by ERISA. The plaintiffs in Martori Bros. charged their employer with refusing to bargain in good faith. The California Agricultural Labor Relations Board entered a "make whole"

order, as permitted by California Labor Code § 1160.3, requiring the employer to pay damages computed as the difference between the fringe benefits actually received by the plaintiffs and the fringe benefits they would have received if the employer had bargained in good faith.

The employer sued in federal court to enjoin the payment, claiming that California Labor Code § 1160.3 was preempted by ERISA insofar as it purported to allow "make whole" orders calculated by reference to fringe benefits covered by an ERISA employee benefit plan. The Ninth Circuit held the "make whole" order did not award ERISA benefits but simply awarded damages calculated by making reference to ERISA benefits. This relation to

an ERISA plan was too tenuous and remote to hold that the statute permitting the "make whole" order was preempted by ERISA, said the court. 781 F.2d at 1358-59.

Even if claims like those made by the plaintiffs were preempted by ERISA, the plaintiffs' fears are unfounded. 29 U.S.C. § 1140 prevents an employer from discharging, disciplining, or discriminating against an employee in retaliation for the employee's exercise of rights under an ERISA plan or to interfere with the employee's attainment of rights under such a plan. Thus, § 1140 gives the discharged employee a remedy. Moreover, section 1140 specifically provides, "The provisions of Section

1132 of this title shall be applicable in the enforcement of this section." If § 1132 empowered former participants to bring suit, it would not have been necessary to include this enforcement provision in § 1140. In doing so, Congress expressly and specifically recognized a limited exception to the "participant" standing requirements of § 1132, and provided employees subjected to retaliatory discharge, who do not fall within the statutory definition of "participant", the right to bring suit. In this case, of course, plaintiffs make no claim that they were wrongfully terminated, or even that they were terminated at all.

ERISA also protects against the plaintiffs' fear that employers will commit breaches and then terminate their pension plans to insulate themselves from liability. To protect against this sort of abuse Congress provided elaborate safeguards, including various provisions for notice of plan termination and a determination by the Pension Benefit Guaranty Corporation that the plan assets are sufficient to pay all benefits owed (29 U.S.C. § 1341 et seq.), plan termination insurance (29 U.S.C. § 1301 et seq.), claims procedures (29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1 (1975)), investigative authority in the Secretary of Labor (29 U.S.C. § 1134), requests to the Secretary of Labor to

exercise his or her enforcement authority (29 C.F.R. §2560.502-1 (1975)), criminal penalties for preventing the exercise of ERISA rights (29 U.S.C. § 1141), etc.

Congress may well have concluded the above safeguards were sufficient to protect against the kind of fraudulent plan terminations the plaintiffs fear. Moreover, this Court need not address in this case the remedy provided if an employer terminates a plan in bad faith for the purpose of insulating himself from liability for breaches of fiduciary duty. That did not happen in this case and plaintiffs do not allege that it did.

The circuit courts that have been confronted with the issue have uni-

formly and correctly determined that persons who have received lump sum distributions of their benefits lack standing to sue under ERISA. The regulations of the Department of Labor provide the same. There is therefore no compelling reason for this Court to add its voice to those that have already spoken on the issue. The petition for certiorari should be denied.

2. BECAUSE THEY ARE NOT PARTICIPANTS, PLAINTIFFS CANNOT INVOKE FEDERAL JURISDICTION UNDER ERISA

Plaintiffs make two separate, but related, arguments in an attempt to show that even if they are not participants under § 1002(7) they are entitled to sue under ERISA. Their

first argument is that there is a "substantial and material conflict" among the Courts of Appeal as to whether the grant of jurisdiction in § 1132 extends only to participants and the other parties explicitly listed there. Petition at 11-16. However, the conflict to which plaintiffs refer is not a "substantial" one and, even if it were, is not "material" to this case.

Plaintiffs base their argument on two Ninth Circuit decisions which hold that even though employers are not specifically listed in § 1132 as having the right to sue under ERISA, they have standing to assert at least some claims. Fentron Industries v. Nat. Shopmen Pension Fund, 674 F.2d

1300 (9th Cir. 1982); Award Service, Inc. v. N. Cal. Retail Clerks Unions, 763 F.2d 1066 (9th Cir. 1985), cert. denied 106 S. Ct. 850, 88 L. Ed. 2d 890 (1986). As plaintiffs point out, the reasoning of Fentron and Award Service has been rejected by the Second and Sixth Circuits and by a district court in a decision affirmed by the Third Circuit. Pressroom Unions Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.) cert. denied, 464 U.S. 845, 104 S. Ct. 148, 78 L. Ed. 2d 138 (1983); Whitworth Bros. Storage Co. v. Cent. States, 794 F.2d 221 (6th Cir. 1986); Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia, 549 F. Supp. 307 (E.D.

Pa. 1982), aff'd, 720 F.2d 661 (3d Cir. 1983). In addition, although not noted by plaintiffs, the Eighth Circuit has affirmed a decision rejecting the Ninth Circuit's reasoning and a district court in the Tenth Circuit has concluded that the Tenth Circuit would reject it as well. Central States v. Admiral Merchants Motor Freight, Inc., 511 F. Supp. 38, 46 (D. Minn. 1980), aff'd, 642 F.2d 1122 (8th Cir. 1981); Blue Cross & Blue Shield of Kansas City v. Bell, 596 F. Supp. 1053, 1058 (D. Kan. 1984). Thus, at least four, and perhaps five, Circuits disagree with the two Ninth Circuit cases on which plaintiffs rely. Such a one-sided conflict is hardly "substantial"

enough to require the intervention of this Court; indeed, this Court has previously declined to review at least two of the conflicting decisions. Award Service, supra, 106 S. Ct. 850, 88 L. Ed. 2d 890 (1986); Pressroom, supra, 464 U.S. 845, 104 S. Ct. 148, 78 L. Ed. 2d 138 (1983).

More important, the conflict on which plaintiffs rely is not "material" here in any event. Fentron and Award Service based their holdings on the supposition that Congress' omission of employers from § 1132, in the absence of legislative history showing it was intentional, did not show an intent to preclude them from suing. 674 F.2d at 1305; 763 F.2d at 1068. Here the situation is much

different. Section 1132 explicitly grants "participants" the right to sue. It does not grant "former participants," such as plaintiffs here, that right. If Congress had intended to confer standing on former members of the class mentioned, it could and would have said so, as it did in § 1002(7) when it expressly defined "participant" to include former as well as current employees. Since it did not do so, § 1132 should be construed in accordance with this Court's observations in Massachusetts Mutual Life Ins. Co. v. Russell, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985):

> The six carefully-integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incor-

> porate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."

105 S. Ct. at 3093 (emphasis in original); see also Tuvia Convalescent Center v. National Union, 717 F. 2d 726, 730 (2nd Cir. 1983) and Pressroom, supra, 700 F.2d at 893 (since legislative history is silent, court must conclude that Congress did not intend to expand jurisdiction to cover parties not listed in § 1132).

Thus, the conflict on which plaintiffs rely relates only to whether employers, a class of persons simply not mentioned in § 1132, have standing to sue. In this case, by

contrast, the issue is whether Congress intended the class of "participants," which it did explicitly mention in the statute, to include former participants such as plaintiffs. The conflict, even if it were a substantial one, would not be material to this case and would not justify review by this Court.

Plaintiffs' second argument for jurisdiction notwithstanding their lack of participant status is that their claims are cognizable under the federal common law of ERISA and therefore "arise under" federal law for purposes of 28 U.S.C. § 1331. Petition at 31-36. They assert that "'[I]f a federal cause of action completely preempts a state cause of

action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.'" Id. at 34. In support of that proposition, plaintiffs cite this Court's opinion in Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983). However, Franchise Tax Board not only does not support plaintiffs' argument for jurisdiction here, it effectively rebuts it.

In Franchise Tax Board, a state agency charged with enforcement of state tax laws sought a declaratory judgment that ERISA did not preempt it from enforcing state tax levies against a union vacation trust. The trust argued, as do plaintiffs here,

that federal jurisdiction existed under 28 U.S.C. § 1331 because the action "arose under" the federal common law of ERISA. 463 U.S. at 24. This Court rejected the argument. The Court held that even though an action for declaratory relief was properly subject to the federal common law of ERISA, such an action by one not included in the class of persons granted the right to bring such an action under ERISA did not "come within the scope of the federal cause of action" and therefore did not necessarily "arise under" federal law:

> It does not follow . . . that either of appellant's claims in this case comes within the scope of one of ERISA's causes of action.
>
> . . . .

> . . . The question on which a declaration is sought . . . is undoubtedly a matter of concern under ERISA. . . . and thus comes within the class of questions for which Congress intended that federal courts create federal common law. . . . Nevertheless, [the trust's] argument that appellant's second cause of action arises under ERISA fails . . . . ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for relief by some other party does not "arise under" that provision.

463 U.S. at 24-27 (emphasis added; footnotes omitted).

Similarly, in New Jersey State AFL-CIO v. State of N.J., 747 F.2d 891 (3d Cir. 1984), a labor union sought a declaratory judgment that certain state statutes were preempted by ERISA. The court concluded it had no

jurisdiction because the claim did not "arise under" federal law:

> In order for the federal courts to have jurisdiction plaintiff's complaint must show that the case arises under federal law. . . .
>
> . . . .
>
> . . . Even if plaintiff's claim were justiciable, which is questionable, it does not establish that its claim arises under federal law. . . . ERISA does indeed provide that various civil actions may be brought by the Secretary, participants, beneficiaries and fiduciaries . . . . However, only participants and beneficiaries may bring suit (in either state or federal court) to clarify rights to future benefits under the terms of the plan. . . . It is clear from the statute that labor unions are neither participants nor beneficiaries, and consequently plaintiff does not fall within this provision.

Id. at 892-93, citing Franchise Tax Board, supra (emphasis in original; citations omitted).

Thus, the fact that a cause of action is the type of claim which is a proper subject of federal common law does not necessarily mean that anyone asserting the right is entitled to sue in federal court; rather, the claim must "come within the scope of the federal cause of action." Franchise Tax Board, supra, 463 U.S. at 24. If the express terms of the statute creating the right limit the class of persons entitled to assert it, then a suit by some other person does not "come within the scope of the federal cause of action" and consequently does not "arise under" federal law.

For this reason, plaintiffs' reliance on Whitworth Bros. Storage Co. v. Cent. States, 794 F.2d 221 (6th Cir. 1986) is misplaced. Whitworth

held that an employer's suit for restitution of pension plan contributions it made by mistake was properly subject to federal jurisdiction under 28 U.S.C. § 1331. The statute creating the right to restitution of contributions paid by mistake, § 1103(c)(2)(A), did not put any limits on the parties entitled to assert the right. Consequently, the court was willing to infer a congressional intent to extend the right to employers even though employers are not mentioned in the provisions (§ 1132) governing actions under ERISA generally:

> 29 U.S.C. §§ 1103, 1132 express Congress' intent not to favor employers and other parties not named in the statute with a federal statutory cause of action. However, the specific language of the statute, section 403(c)(2)(A)(ii), evinces congressional intent not to

completely preclude employer recovery of mistakenly paid contributions.

Id. at 236 n. 24 (emphasis added). Here, of course, the applicable statutory language not only evinces no intent not to preclude suits by those in plaintiffs' position, it clearly shows Congress intended to limit federal jurisdiction to actions by the parties specifically enumerated. Consequently, actions by other parties do not "arise under" ERISA and are not subject to federal jurisdiction under 28 U.S.C. § 1331. See Franchise Tax Board, supra.

3. NO RESPONSE TO THE PETITION FOR REHEARING WAS REQUIRED AND THE PLAINTIFFS WERE NOT PREJUDICED BY THE NINTH CIRCUIT'S FAILURE TO REQUEST A RESPONSE.

Petitions for rehearing to the United States Courts of Appeals are governed by Federal Rule of Appellate Procedure 40. Under that rule "[n]o answer to a petition for rehearing will be received unless requested by the court, but a petition for a rehearing will ordinarily not be granted in the absence of such a request." Fed.R.App.P. 40(a).

Plaintiffs argue the Ninth Circuit's granting of defendants' petition for rehearing violated Rule 40 because no answer to the petition was requested from the plaintiffs.

But the rule by its terms does not require the court to call for a responsive brief. Instead, the appellate court is given discretion to decide when an opposing argument would be helpful. As a commentary to Fed.R.App.P. 40 states:

> In the very rare instances in which a reply is useful, the court will ask for it.

Fed.R.App.P. 40, Notes of Advisory Committee on Appellate Rules. (See also, Director, etc. v. Cooper Associates, Inc., 607 F.2d 1385 (D.C. Cir. 1979), in which the court cited

to Rule 40 as an example of instances in which reply briefs were "inappropriate." 607 F.2d at 1389, n. 14.)

Plaintiffs argue that the court may only grant a rehearing without asking for a responsive brief in "extraordinary" circumstances. To support this claim, they rely on United States v. Allegheny-Ludlum Industries, Inc., 568 F.2d 1073 (5th Cir. 1978). The Fifth Circuit in Ludlum granted a rehearing on a motion to award attorney's fees in an employment discrimination suit without asking for a response to the petition. The court withheld action on the petition, awaiting a Supreme Court ruling that decided the same issue. The Fifth Circuit noted that petitions for rehearing are not

"ordinarily" granted without a response, "but a case which the Supreme Court specifically and unanimously notes as having adopted the wrong rule, [citation], is not an ordinary case." 568 F.2d at 1074.

From this, plaintiffs argue that their case was the ordinary one and that a responsive brief by them "would have been of assistance to the court and was necessary to protect the rights gained by plaintiffs in their victory . . . below." Petition at 47. This argument is deficient on two grounds. First, the Ludlum court did not hold that the circumstances present there were the only ones under which a response would be unnecessary. Though Ludlum is the only reported opinion which discusses this

issue, it is certainly not the only factual situation which will obviate the need for a reply when a petition for rehearing is granted. The Ninth Circuit may well have found this to be an extraordinary situation too. Confronted with clearly contrary authority (Joseph v. New Orleans Electrical Pension & Retirement Plan, 754 F.2d 628 (5th Cir. 1985), cert. denied ____ U.S. ____, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985)) and a persuasive Department of Labor regulation, (29 C.F.R. §2610.2), the court obviously realized the wrong result had been reached.

Second, plaintiffs did have a chance to rebut the Reese defendants' petition for rehearing. After the petition for rehearing was granted,

plaintiffs filed their own petition for a rehearing of that decision and made their arguments concerning the points at issue now. In short, plaintiffs did get their day in court and were not harmed by the Ninth Circuit's actions.

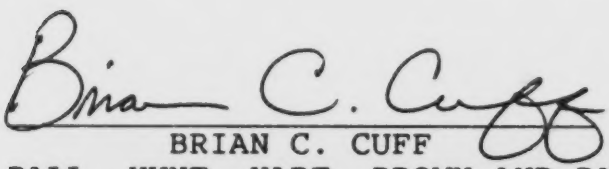
Moreover, at page 39 of their petition for certiorari, plaintiffs claim the Ninth Circuit correctly adopted the plaintiffs' arguments in its first opinion but incorrectly departed from those same arguments when it granted defendants' petition for rehearing. Obviously, the court had the plaintiffs' arguments well in mind when it considered the defendants' petition for rehearing. Allowing the plaintiffs to repeat those arguments in response to

defendants' petition for rehearing would have produced no different result. Therefore, plaintiffs were not prejudiced by the Ninth Circuit's failure to request an answer to defendants' petition for rehearing.

CONCLUSION

For the foregoing reasons, defendants request that the plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,



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